# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 317

JAMES H. MATTHEWS & CO. (INDUSTRIAL MARKING PRODUCTS DIVISION), PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. 13–19) is reported at 342 F. 2d 129. The Board's decision and order in the unfair labor practice case (J.A. 13a–14a)[1] are reported at 145 NLRB 1680. The Regional Director's Report on Objections and Certification of Representative in the underlying representation case (J.A. 30a–60a) is unreported.

[1] "J.A." refers to the Joint Appendix in the court below, which has been filed with the petition.



783-111—65

## JURISDICTION

The decision of the court of appeals (Pet. 13–19) was entered on February 11, 1965. A petition for rehearing was denied on April 6, 1965, and a decree was entered on that date (Pet. 20–21). The petition for a writ of certiorari was filed on July 2, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, where the parties have entered into a consent election agreement which provides that the Regional Director's determination of election issues shall be final and binding, the National Labor Relations Board and the reviewing court may properly decline to set aside the Regional Director's decision absent a showing that he has acted arbitrarily or capriciously.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. *et seq.*), are set forth at pp. 3–4 of the petition.

## STATEMENT

On February 5, 1963, petitioner Company and the Union[2] entered into an "Agreement for Consent Election" (J.A. 3a, 39a). This agreement provided the procedure under which the employees were to vote on whether they wished the Union to become their col-

[2] Local 605, International Union of Electrical & Machine Workers, AFL–CIO.

lective bargaining representative, specifying the appropriate bargaining unit, the eligible voters, and numerous other election matters. The parties also agreed that (J.A. 4a, emphasis supplied):

> Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board, *provided that the determination of the Regional Director shall be final and binding upon any question,* including questions as to the eligibility of voters, *raised by any party hereto relating in any matter to the election,* and provided further that rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final.

The Agreement further provided (J.A. 4a) that either party might file objections to "the conduct of the election or conduct affecting the results of the election," that the Regional Director would "investigate the matters contained in the objections and issue a report thereon," and that:

> The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

The election was held on February 21, and the Union was chosen as bargaining representative by a vote of 72 to 67 (J.A. 4a; 39a). The Company filed objections to the election on the ground, *inter alia,* that, two days before the election, the Union had dis-

tributed a leaflet criticizing the Company's hospitalization and pension plans which contained serious misrepresentations (J.A. 40a).

On June 26, following an investigation, the Regional Director issued a "Report on Objections and Certification of Representative" (J.A. 39a–60a). He concluded that, although some of the statements contained in the leaflet were inaccurate, the misstatements did not prevent the employees from exercising a free choice in the election (J.A. 54a). In reaching this conclusion, he noted that the plans had been in effect for many years and that the Company, through the booklets it handed out to all eligible employees, had made efforts in the past to acquaint the employees with the plans. Further, he found that the Company had sufficient knowledge and time adequately to refute the charges made in the leaflet. Accordingly, he overruled petitioner's objections and certified the Union as the employees' bargaining representative. (J.A. 54a–57a, 59a–60a.)

The Company refused to bargain with the Union on the ground that the Regional Director erred in refusing to set aside the election. In the ensuing unfair labor practice proceeding, the Board, affirming its Trial Examiner, found that the Regional Director had not acted arbitrarily or capriciously in overruling the Company's objection to the election, and accordingly declined to permit relitigation of that issue. The Board thus found that the Company had violated Sections 8(a) (5) and (1) of the Act by refusing to bargain with the Union. (J.A. 6a–10a, 13a–14a.) The Board ordered the Company to cease and desist

from the unfair labor practice found, to bargain with the Union, and to post appropriate notices (J.A. 10a–13a, 14a).

The court of appeals enforced the Board's order in full (Pet. 13–19).

## ARGUMENT

The court of appeals' decision is correct and there is no conflict of decisions. There is thus no occasion for further review.

1. The Company and the Union entered into a consent election agreement which left to the final determination of the Regional Director "any question * * * raised by any party * * * relating in any matter to the election," including the "method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith" (p. 3, *supra*). The Board has made this form of consent agreement available since the earliest days of the Act, so that the parties could, if they desired, "provide for the prompt and final settlement of such controversies as may arise between [them], and thus * * * minimize delay in the administration of the Act." *Semi-Steel Casting Co.* v. *National Labor Relations Board,* 160 F. 2d 388, 391 (C.A. 8), certiorari denied, 332 U.S. 758.[3] In keep-

[3] If the parties desire a Board determination, they may avail themselves of an alternative form of consent agreement which provides that issues arising from the election shall be resolved by the Board, rather than the Regional Director. National Labor Relations Board Rules and Regulations, Sec. 102.62(b), 29 C.F.R. 102.62(b).

ing with the agreement of the parties to make the Regional Director the final arbiter of disputed issues, and in order to attain the expedition which the agreement is designed to achieve, the Board has concluded that, where the parties have so agreed, the Regional Director's decision will not be disturbed unless it is "arbitrary or capricious."[4] And, as petitioner acknowledges (Pet. 8–9), the courts of appeals, like the court below here, have consistently sustained this position.[5] See also *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599.

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[4] "To hold otherwise would permit an employer deliberately to ignore binding commitments embodied in a consent agreement; would open the door to subterfuges for hampering and delaying a final determination of a bargaining representative; and would tend to defeat, rather than to effectuate, the policies of the Act." *Capitol Greyhound Lines*, 49 NLRB 156, 159, enforced, 140 F. 2d 754 (C.A. 6), certiorari denied, 322 U.S. 763. See also *Pacific Multiforms Co.*, 128 NLRB 796, 799; *General Tube Co.*, 141 NLRB 441, 445.

[5] *Buffalo Arms* v. *National Labor Relations Board*, 224 F. 2d 105, 109 (C.A. 2); *Elm City Broadcasting Corp.* v. *National Labor Relations Board*, 228 F. 2d 483, 485 (C.A. 2); *National Labor Relations Board* v. *General Armature & Mfg. Co.*, 192 F. 2d 316, 317, n. 1 (C.A. 3), certiorari denied, 343 U.S. 957; *National Labor Relations Board* v. *J. W. Rex Co.*, 243 F. 2d 356, 358 (C.A. 3); *National Labor Relations Board* v. *Capitol Greyhound Lines*, 140 F. 2d 754, 758–759 (C.A. 6), certiorari denied, 322 U.S. 763; *Diversey Corp.* v. *National Labor Relations Board*, 325 F. 2d 489, 491 (C.A. 7); *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 391 (C.A. 8), certiorari denied, 332 U.S. 758; *National Labor Relations Board* v. *Parkhurst Mfg. Co.*, 317 F. 2d 513, 518 (C.A. 8); *National Labor Relations Board* v. *Carlton Wood Products, Co.*, 201 F. 2d 863, 866 (C.A. 9); *National Labor Relations Board* v. *Sumner Sand & Gravel Co.*, 293 F. 2d 754, 755 (C.A. 9).

Petitioner's sole contention (Pet. 9–11) is that this well settled principle is contrary to Section 10(e) of the Act, which provides that the reviewing court shall accept the Board's findings of fact in an unfair labor practice case only "if supported by substantial evidence on the record considered as a whole." There is no merit to this contention. The parties may by consent agree to accept a more limited form of appellate review than the statute would otherwise afford, and this was the effect of their agreement here. See *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318; cf. *United States* v. *Wunderlich*, 342 U.S. 98.

2. Nothing in this Court's decisions in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474; *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404; or *National Labor Relations Board* v. *Pittsburgh Steamship S.S. Co.*, 340 U.S. 498, is to the contrary. Those cases did not involve election issues and in none was there an agreement to be bound by administrative action such as existed here. Petitioner's reliance on *Celanese Corp.* v. *National Labor Relations Board*, 291 F. 2d 224 (C.A. 7), is similarly misplaced. Although that case did involve an election issue, there was no agreement to be bound by the rulings of the Regional Director.[6]

[6] When, subsequent to its decision in *Celanese*, the Seventh Circuit was faced with an agreement to be bound by the determinations of the Regional Director, it limited the scope of review to a consideration of whether the Director had acted in an arbitrary or capricious manner. *Diversey Corp* v. *National Labor Relations Board*, 325 F. 2d 489, 491.

## CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

RALPH S. SPRITZER,
*Acting Solicitor General.*

ARNOLD ORDMAN,
*General Counsel,*
DOMINICK L. MANOLI,
*Associate General Counsel,*
NORTON J. COME,
*Assistant General Counsel,*
MICHAEL N. SOHN,
*Attorney,*
*National Labor Relations Board.*

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